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Special Issues

6.1 Special and Differential Treatment and the Development Box

There is now general agreement that the different circumstances of developing countries warrant special and differential treatment. This is necessary if there is to be any trade agreement that goes much beyond current arrangements, and yet promotes the development of the poorest countries in the world.

There are at least two approaches to special and differential treatment. The first lifts the 'single undertaking', allowing countries to decide which of the provisions they wish to sign up to. Many developing countries fear, however, that eliminating the single undertaking will lead to a divide and rule strategy, in which a few countries sign up to the 'higher standards', putting pressure on the others to do so.

That is why the alternative approach of *generalised rules embodying differential treatment* is preferred. Thus, for instance, developing countries should be given a longer adjustment period. They should be given greater latitude in providing subsidies, especially for new technology. If non-tariff barriers are retained, the developing countries should receive differential treatment.

A variant of this proposal would divide the WTO's agenda into two or more schedules. The core market access agenda and those elements which would not function in the presence of a free-rider problem would remain subject to the 'single undertaking'. This agenda would embody generalised SDT for developing countries. A second schedule would include peripheral trade issues for which the free rider is less significant and where most of the gains from liberalisation are captured domestically. Countries could choose to opt out of any or all of the elements of this schedule, depending on whether or not the proposals were consistent with their other national development policies.

Such differential treatment would facilitate the design of trade agreements which are more likely to promote economic development. A blanket proscription against government subsidies to technology (industrial policies) is likely to have an adverse effect on developing countries, and indeed is likely in practice to be unfair; the US conducts its industrial policy largely through the military, which supports a wide variety of technological developments that eventually have important civilian applications. It is hard to conceive of a trade agreement that would prohibit the transfer of such technologies.

Thus, each provision of a trade agreement should be assessed for its impact on development, and be designed in such a way that development is enhanced, employing where necessary provisions for special and differential treatment. Moreover, the totality of the trade agreement should be assessed, to ensure that a fair share of the benefits (the net incidence) accrues to developing countries.

6.2 Intellectual Property Issues

Recent debates about intellectual property need to be put into context. Intellectual property provides innovators with a temporary monopoly power. Monopoly power always results in economic inefficiency. There is accordingly a high cost involved in granting even a temporary monopoly power. But the benefit is that by doing so, greater motivation is provided for inventive activity. The dynamic gains, it is hoped, exceed the static losses.

Much of the most important innovative activity is outside the realm of intellectual property. Behind the inventions associated with atomic energy or lasers were basic discoveries in physics. Behind the computer were basic discoveries in mathematics. The basic research which underlies practical innovation in almost all arenas occurs in universities and government research laboratories; few of these discoveries are protected by intellectual property rights agreements.

In many cases, it is neither desirable nor practical for this to happen. Often the applications which give market value to the discovery occur years after the original discovery (beyond the normal patent life). Ideas give rise to other ideas, and there is no way in which it can be ascertained which ideas proved instrumental in the creation of follow-on ideas.

Most important, it should be recognised that material reward provides little of the motivation for much of this intellectual activity. To be sure, it could not occur without financial support. The salaries of the researchers have to be paid, and if the financial support is woefully inadequate many would-be researchers will divert their attention to other areas. Yet there is little evidence that stronger intellectual property protection would generate a greater flow of basic ideas.

Knowledge is a public good, and this is especially true for the fruits of basic research, which is why governments have an important responsibility for its support. Intellectual property protection thus constitutes only a part – and not the most important part – of what may be called our knowledge and research system. Providing greater support to this one part of the system may actually harm other parts of the system and impede the progress of science. Note that the system under which basic research is conducted is a very open one, in which ideas circulate freely and in which, in fact, scientists put considerable effort into disseminating their ideas and encouraging others to use them. In many ways, this is the opposite of the premise underlying intellectual property, which seeks to circumscribe the use of knowledge, limiting it only to those who are willing and able to pay.

Thus, the intellectual property regime must balance concerns about incentives for research with the costs of the inefficiencies associated with monopoly power; it must balance the interests of *some* producers of knowledge with the interests of other producers of knowledge, of consumers and of society more generally.

Since knowledge is the most important input into research, better intellectual property protection may actually impede the research process. Much of the effort of patenting is directed at trying to maintain monopoly power, ensuring that others will not invent around the patent. Some of the value of each patent entails 'enclosing' what was previously public knowledge.

The intellectual property provisions of the Uruguay Round (TRIPS) were unbalanced. Nowhere has the lack of balance been more in evidence than in TRIPS treatment of medicines, and there remain concerns even about the agreement that was reached in the run-up to Cancun. Compulsory licensing should be extended to any drug that is life-saving or which controls diseases which have serious effects on health. Even if malaria or dysentery are not life-threatening to many people, they enervate millions of people in the developing world, impeding their productivity and lowering their living standards. There may not be an 'emergency' or crisis, as there is in the case of HIV-AIDS, but the situation is still of critical importance to the developing world.

The revenues lost to the pharmaceutical companies as a result of such compulsory licensing are likely to be miniscule relative to the revenues generated by the exercise of monopoly power in the more advanced industrial countries, and therefore are likely to have a negligible effect on the development of drugs. The cost to the developing countries of failure to provide drugs at affordable prices is enormous.[90]

The disparity between price and marginal cost of production can be viewed as a tax, used to finance research. Basic principles of equity raise questions about the levying of this tax on some of the poorest people in the world. If the international community believes that there is a need to provide greater incentives for research into the development of medicines, then they should do so directly, by funding research in either the public or private sector, not by levying a tax on the poor. One proposal suggests that each country should make a contribution to research, the magnitude of which would be based on its income and the form of which would be of its own choosing. The contribution, for instance, could be in the form of direct expenditure on research, licensing fees or the implicit taxes paid to holders of patents.

There are other issues which affect developing countries' access to life-saving medicines at affordable prices. One concern is the ease with which generic drugs are able to become established, and how quickly they can enter a market at the expiration of a patent. In some of its bilateral trade agreements, the US has been working to make it more difficult. If there is to be an intellectual property agreement within a *development round*, it should enshrine principles facilitating the rapid entry of generics.

The problems posed by bio-piracy are equally serious. While, as noted earlier, some of the claims of Western firms may not be sustained when they are contested in court, it is costly for developing countries to mount a legal challenge. One proposal is that there should be a change in the *presumptions* associated with patenting, say, traditional medicines, with the party applying having to show that there was no recognition of its medicinal properties, with the adjudication occurring in an international tribunal, and with the legal expenses of the developing country being divided between the applicant and the developing country in proportion to the ratio of their per capita incomes.

6.3 Competition Issues

Competition was supposed to be one of the Singapore issues, but the discussions on competition have devolved more into ensuring fair competitive access for developed countries into developing country markets than into ensuring that markets are really competitive and that developing countries have fair access to developed country markets.

Ensuring Competition. Today, many companies operate across boundaries. Competition policy in one country can affect others. The United States and Europe have increasingly come to recognise this. The US instituted an action against Japan, claiming that anti-competitive practices in Japan, which the Japanese government had not stopped, had unfairly discriminated against Kodak. Europe brought actions against Honeywell on anti-trust grounds and the American government complained that its standards were too high. The EU is considering taking actions against Microsoft; even though American courts have found Microsoft guilty of violations of anti-trust laws, there is widespread concern that the remedies were insufficient.

The concerns are two-sided: there is a worry that the anti-trust laws will be applied in a discriminatory way so as to hurt foreign companies; and that anti-trust actions will fail to take account of anti-competitive effects in developing countries. Ideally, there should be harmonisation of anti-trust laws at the highest standard. Advocates of strong competition worry, however, that harmonisation will occur based on the lowest common denominator, and that an international agreement will legitimate these lower standards.

Given these difficulties, initial steps would include insisting on national non-discriminatory treatment; this would entail either eliminating dumping duties, or revising anti-trust legislation to apply the same standards to foreign and domestic firms.

A second reform would require that national authorities look carefully at anti-competitive effects outside their own jurisdiction.[91] Not only should domestic anti-trust regulators look at competitive effects abroad, but foreign consumers should have the right to take actions in foreign courts against corporations that abuse their market power. Cross-border class action suits should be sanctioned, allowing consumers in multiple jurisdictions to band together to impose, for instance, triple damages, with judgments enforceable in the jurisdiction of the home country.

Thirdly, consumers and governments in all countries should be able to take actions (including class action suits) against international cartels, including those cartels in which governments are a party or where governments have sanctioned the cartel. (While some developing countries may lose from such an action, the benefits received by others would almost surely outweigh the losses. For instance, oil producers may be worse off, but oil consumers would be better off.)

Ensuring fair access. Developed countries are concerned that restrictions imposed by developing countries (such as affirmative action or preferences for small and medium-sized enterprises) have a differential effect on multinationals. But a development round should recognise the legitimate role of such restrictions as social and developmental policy tools, and a high burden of proof should be imposed on any challenge to such restrictions which attempts to establish that they have no legitimate social or developmental objectives or that the objectives could not be practicably[92] achieved in a significantly less trade-distorting way. At the same time, developed country regulations and practices which have an adverse effect on firms from developing countries, for example high licensing fees, should be held to a much higher standard.

6.4 Regional and Bilateral Trade Agreements and South–South Trade

With the collapse of the Doha Round, the United States threatened to pursue a set of bilateral and regional trade agreements. Such agreements are against the spirit of the multilateral trading system, which has been based on most favoured nation principles. Moreover, developing countries may be even more disadvantaged in one-to-one bargaining with the United States; a series of such agreements may leave many developing countries worse off than they otherwise would have been, even with another unfair multilateral agreement. While in principle such agreements are only WTO consistent if there is limited trade diversion, in practice little attention has been paid to this requirement. The argument that these regional agreements are useful as a step towards improved multilateral agreements is also suspect. The kind of multilateral agreement to which they may lead may be more unbalanced than one which would be directly entered into without the more circuitous route. More to the point, there is a high cost to the round-about approach. To the extent that there is *temporary* trade diversion, some industries are being *temporarily encouraged*, only to be later discouraged. Such adjustment costs are typically high in developed countries; there may be significant costs of entry and exit, and with a scarcity of capital, the burden on developing countries may be particularly large.

In the next section, we propose institutional reforms that address these issues. But there is another arena in which trade agreements which fall short of full multinational agreements may be desirable; these entail reducing the restrictions on South–South trade. South–South trade makes up some 40 per cent of developing country trade. Developing countries have much higher tariff levels than developed countries. This suggests there are considerable gains available from liberalisation of South–South trade.

How then should WTO agreements manage the trade-off between the need to protect domestic markets from competition from developed countries, while not hindering trade between developing countries? One solution might be to allow developing countries to offer preferential market access deals to each other in the same way that the EU's 'Everything But Arms' initiative offers free access to developing countries only. Such a provision would have one further advantage: preferential treatment by some developed countries (most notably the United States) is based on *political conditionality*; it is a 'gift' that is constantly under threat of being withdrawn, and this risk limits its effectiveness. Moreover, the granting of such preferences becomes a lever with which developed countries can extract other concessions from developing countries. A South–South agreement would be likely to focus more exclusively on trade issue, and would not suffer from these 'abuses'.